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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-191

THE VILLAGE OF BELLE TERRE, an incorporated municipality, JAMES PHILBIN, Mayor of the Village of Belle Terre, ROBERT DOERR, Deputy Mayor and Trustee of the Village of Belle Terre, VINCENT BOVE, Trustee of the Village of Belle Terre, VINCENT KARWOWSKI, Trustee of the Village of Belle Terre, and FRANCIS STOLZ, Trustee of the Village of Belle Terre,

Appellants,

—against—

BRUCE BORAAS, ANNE PARISH, MICHAEL TRUMAN, EDWIN DICKMAN and JUDITH DICKMAN,

Appellees.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION TO AFFIRM

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Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, hereby move to affirm the judgment of the United States Court of Appeals for the Second Circuit entered on May 1, 1973, on the ground that the decision below is so manifestly correct as not to need further argument before this Court.

STATEMENT OF CASE

At issue in this suit is the constitutionality of a zoning ordinance of the incorporated Village of Belle Terre, New York, which prohibits groups of more than two (2) unrelated persons, as distinguished from traditional families consisting of any number of persons related by blood, adoption or marriage, from occupying a residence within the Village of Belle Terre, which is zoned entirely for "one family" occupancy.

Appellees Edwin and Judith Dickman own a house in the suburban municipality of Belle Terre which is located in Suffolk County, New York. At the time this suit was commenced, appellees Boraas, Parish and Truman were tenants of the Dickmans. They lived in the Dickman house along with three other persons. All six tenants were students at the State University at Stony Brook, which is approximately a fifteen-minute drive from Belle Terre. The leasehold arrangement between the Dickmans and the students was to expire on May 31, 1973.[1]

Under the past and present living arrangement at the Dickman house, none of the six student occupants is related. Each occupies one of the six bedrooms and pays a portion of the rent. The six are organized and function as a single housekeeping unit insofar as they use the common cooking facility, dine together and share housekeeping, "yard" chores, and a "house" checking account from which dis-

[1] The leasehold arrangement which was to expire on May 31, 1973 has been extended. And of the original tenant plaintiffs in this action, Bruce Boraas and Michael Truman continue to occupy the house which they share with other students with whom they are not related. Anne Parish is no longer a resident of Belle Terre.

bursements for necessary household expenses are made. It is conceded that all of the occupants have behaved in a responsible manner, and no immoral conduct on their part is suggested.

Boraas, Parish and Truman each came to the Dickman house after extensive individual searches for accommodations in the Stony Brook vicinity. Each found that rents were prohibitive for the few apartment units which were available and that only dormitories on campus or cooperative residences like that which they evolved in the Dickman house were financially feasible. Moreover, each of the student appellees has found the arrangement in the Dickman house to afford an attractive, convenient and congenial residential life style—and one which affords a useful forum for scholarly exchange.

The Building Zone Ordinance of the Village of Belle Terre restricts the use of land in the village to single family houses, and further, restricts the actual occupancy of each house to a single family. "Family" is defined as follows:

> "One or more persons related by blood, adoption or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption or marriage shall be deemed to constitute a family." [Article I, Section D-1.35a]

On June 8, 1972, Boraas and Truman were denied residents' beach passes because they were regarded by a Village official as "illegal residents," and as such not entitled to beach permits. On July 19, 1972, the Dickmans, the owners-

lessors, were served with a summons returnable before the Village Justice on July 28, 1972. However, because the Village Code required a 48-hour notice of violation, which had not been complied with, the summons was withdrawn. On July 31, 1972, the Dickmans were served with the required "Order to Remedy Violations" which notified plaintiffs that failure to remedy the condition might subject them to liability commencing on August 3, 1972.

On August 2, 1972, this action was commenced in the United States District Court for the Eastern District of New York, under the federal Civil Rights Act of 1871, 42 U.S.C. §1983, seeking preliminary and permanent injunctive relief against enforcement of the ordinance and a declaratory judgment invalidating as unconstitutional the prohibition against residential occupancy by more than two persons "not related by blood, adoption or marriage." Jurisdiction was grounded on 28 U.S.C. §§1331(a), 1343, and 2201. Pending a hearing on the constitutional issues, District Judge John F. Dooling, Jr. issued a temporary restraining order. Following a hearing on plaintiffs' motion for a preliminary injunction, Judge Dooling on September 20 denied the motion for a preliminary injunction and upheld the validity of the ordinance.

Plaintiffs appealed the denial of the preliminary injunction to the United States Court of Appeals for the Second Circuit. The Court of Appeals concluded, *inter alia*, that "[t]he discriminatory classification created by the Belle Terre ordinance does not appear to be supported by any rational basis that is consistent with permissible zoning objectives." 476 F.2d 806, 818 (1973). Accordingly, the Court of Appeals reversed the order of the district court

and remanded the matter for further proceedings.[2] On remand to the District Court, and upon all the papers and proceedings heretofore had herein, and upon the oral representations made to the Court by the parties, to the effect that neither party intended to supplement the evidentiary record, District Judge Dooling entered a final judgment declaring the relevant portion of the ordinance unconstitutional and permanently enjoining its enforcement. The Village of Belle Terre appealed the District Court's judgment to the United States Court of Appeals for the Second Circuit which, in light of its prior determination, summarily affirmed the declaratory judgment and injunction on May 1, 1973. It is from this judgment that the Village of Belle Terre and the individually named defendants presently appeal.

ARGUMENT

The crux of this case was simply stated in the Memorandum of District Judge John F. Dooling, Jr., below:

> "The question ultimately posed is whether it is lawful to have a one-family dwelling zoning district which excludes equally small household groups who impose no greater burdens of use on the land, the buildings or the surroundings than a blood-and-marriage family group on the simple and bare ground that such student groups are not families made up of husband, wife and children." See Jurisdictional Statement submitted by appellants herein, at 71a. Cited hereafter as "Jurisdictional Statement."

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[2] Prior to remand, however, a poll of the judges in regular active service was taken at the request of one such judge as to whether this action should be reheard *en banc*. As a majority of the active judges did not vote in favor of a rehearing *en banc* the request was denied. Chief Judge Friendly and Circuit Judges Hays, Mulligan and Timbers dissented from the denial of rehearing *en banc*.

In justification of the challenged ordinance, defendants below proffered two sorts of governmental interests: first, the desire of the present members of the community to surround themselves exclusively with people like themselves, *viz.*, traditional families, and second, a variety of purported concerns within the ambit of traditional zoning goals, such as the regulation of population density and traffic flow. But as to the latter category, Judge Dooling found, as a factual matter, that the ordinance was "all but impossible to justify" in terms of "such familiar zoning objectives as safety, adequate light and air, preservation of the land from overintensive use, avoiding crowding of the population, reduction of traffic congestion and facilitation of adequate transportation, water, sewerage, school, park and other public services." Jurisdictional Statement at 74a. The Second Circuit Court of Appeals concurred in this finding:

> "If some or all of these hypothetical [traditional] objectives were supportable, some form of such ordinance might conceivably be upheld as a valid exercise of state police power. Upon the record before us, however, we fail to find a vestige of any such support." Jurisdictional Statement at 20a.

The defendants proffered virtually no evidence of any kind in support of their claim that traditional zoning objectives would be furthered by the ordinance.[3] On re-

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[3] The only evidence submitted by the defendants which bore even remotely on the question of traditional zoning interests were the following brief representations in an affidavit by the village clerk and treasurer: "There are 220 homes within the Village, all of which are one-family dwellings. Two houses directly opposite the Dickman house had previously been rented. The house directly opposite the Dickman's to the south is a four bedroom house. I spoke

mand, after the February 27, 1973, Court of Appeals decision, Judge Dooling offered the defendants an opportunity to supplement the record before he ruled on the plaintiffs' motion for a permanent injunction; the defendants declined to offer any additional proof. Jurisdictional Statement at 84a.

The issue for both Courts below thus became the legitimacy of social homogeneity as a goal of the police power. Circuit Judge Walter R. Mansfield, writing for the majority of the Court of Appeals, persuasively concluded that the fashioning of an exclusive enclave for traditional families was not a permissible end of government:

> "Turning to the question of whether the Belle Terre ordinance may be sustained upon application of the foregoing principles, we start by examination of the sole ground upon which it was upheld by the district court, namely the interest of the local community in the protection and maintenance of the prevailing traditional family pattern, which consists of occupancy of one-family houses by families based on consanguinity or legal affinity. In our view such a goal fails to fall within the proper exercise of state police power. It can hardly be disputed—and the district court so found—that the ordinance has the purpose and effect of permitting existing inhabitants to compel all others

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with the owner and was advised that it rents for $350.00 per month completely furnished. The house directly opposite the Dickman's to the southwest is a six bedroom house. I spoke with the former tenant who had leased the house until one month ago and was advised that the rent paid was $350.00 per month and the house was completely furnished." Affidavit of Harriet Coorssen in opposition to plaintiffs' motion for a preliminary injunction; Appendix to appellants' brief before the Second Circuit in this matter at 44a-45a.

who would take up residence in the community to conform to its prevailing ideas of lifestyle, thus insuring that the community will be structured socially on a fairly homogeneous basis. Such social preferences, however, while permissible in a private club, have no relevance to public health, safety or welfare. See Kirsch Holding Co. v. Borough of Manasquan, 59 N.J. 241, 281 A.2d 513 (1971); City of Des Plaines v. Trottner, 34 Ill.2d 432, 216 N.E.2d 116 (1966); cf. Moreno v. U. S. Dept. of Agriculture, 345 F.Supp. 310 (D.D.C.) (three-judge court) (per McGowan, Cir. J.), prob. jur. noted, 409 U.S. 1036, 93 S.Ct. 526, 34 L.Ed.2d 485 (1972)."

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"Although local communities are given wide latitude in achieving legitimate zoning needs, they cannot under the mask of zoning ordinances impose social preferences of this character upon their fellow citizens. To permit such action would be to invite, upon similar guise, zoning laws that would restrict occupants to those having no more than two children per family, those employed within a given radius, those earning a minimum income, or those passing muster after interview by a community 'Admissions Committee.' While such selective exclusion may be practiced by private institutions, it cannot be tolerated on the part of a governmental body such as Belle Terre, which is bound to serve the public." Jurisdictional Statement at 18a-19a.

The doctrinal contours of the Court of Appeals decision are strikingly similar to those of this Court's recent decision in *United States Department of Agriculture* v.

Moreno,[4] —— U.S. ——, 41 U.S.L.W. 5105 (June 25, 1973). In *Moreno, supra*, the Court invalidated an amendment to the Food Stamp Act of 1964, which generally excluded from participation in the food stamp program any household containing an individual who was unrelated to any other household member. In *Moreno, supra*, at 5107, the Court announced that "[u]nder 'traditional' equal protection analysis, a legislative classification must be sustained if the classification itself is rationally related to a legitimate governmental interest. See *Jefferson* v. *Hackney*, 406 U.S. 535, 546 (1972); *Richardson* v. *Belcher*, 404 U.S. 78, 81 (1971); *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970); *McGowan* v. *Maryland*, 366 U.S. 420, 426 (1961)." Applying the so-called "rational relationship test," the Court invalidated the challenged provision. In so doing, the Court considered the apparent governmental interest of excluding "hippies" and "hippie communes" from the food stamp program, and the asserted interest of minimizing fraud in the administration of the program. As to the latter interest, the Court held simply that it was not in fact advanced by the challenged provision, 41 U.S.L.W. 5107-08, and as to the former, that it was not a legitimate objective of government. *Id.* at 5107. The Court thus concluded that no rational basis for the provision existed and that it therefore was invalid. *Id.* at 5108.

Moreno, had it been decided by this Court before the Court of Appeals below ruled in this cause, could well have

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[4] It should be noted that the *Moreno* decision parallels the judgment below in actual substance as well as doctrinal framework. Both, as the appellant herein acknowledges, implicate "the rights of unrelated individuals to live together." (Jurisdictional Statement at 11.)

provided the mold from which the contested judgment was struck; as things stand, it is firm validation of that judgment.

CONCLUSION

For the reason that the decision of the Court of Appeals below in the instant matter is entirely consistent with this Court's decision in *United States Department of Agriculture* v. *Moreno, supra,* and for the other reasons adduced above, the judgment of the Court of Appeals in this matter entered on May 1, 1973 should be summarily affirmed on the ground that the decision below is so manifestly correct as not to need further argument before this Court.

Respectfully submitted,

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